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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 252

THE UNITED STATES, PETITIONER,

v.

ARTEMUS C. WELLS ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS, DECEASED, RESPONDENTS.

REPLY BRIEF FOR RESPONDENTS.

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MAY IT PLEASE THE COURT:

We take the liberty of submitting a few suggestions by way of reply to the brief for petitioner. At the time of the preparation of the original brief for respondents a copy of petitioner's brief had not been received by counsel for respondents.

1. In the brief for petitioner it is emphasized that the decedent was more than 70 years of age when he made the gifts in question; and we understand that the

argument of counsel upon the facts of the case is predicated, at least to some extent, upon the decedent's age. We quote the following from the brief for petitioner (p. 6):

> "The Act provides that all gifts made within two years of death are presumed to have been made in contemplation of death unless the contrary is shown. Various types of evidence are available to the taxpayer for the purpose of rebutting this presumption. Of these the fact that the donor was in good health is only one, and is not sufficient to overcome the presumption if the donor was so far advanced in years that death could not, in the nature of things, be far away."

We quote further from the brief for petitioner (p. 16):

> "Perhaps the most common bodily condition which prompts persons to dispose of their property by transfers testamentary in nature is that of advanced years. As the Prerogative Court of New Jersey said in *In re Bottomley's Estate*, 92 N. J. Eq. 202, 208, When a man has passed 'the scriptural mark of three score years and ten', he must necessarily look upon death as being 'not on the horizon of life but in its foreground, and, perhaps, very near'. It is a bodily condition which induces that frame of mind, and existing freedom from a specific illness does not necessarily neutralize it."

And, finally, from page 28 of the brief for petitioner:

> "We submit the facts show that in making all three transfers, the decedent was actuated by the thought of death and its consequences. It

is true that in 1919 he was free from illness, but it is also true that he was at that time almost 72 years of age. If, as we contend, a condition of ill health does not constitute the final test, and age is a bodily or mental condition such as may induce a man to make a final disposition of his property, then we submit that the presumption has not been successfully overcome."

We think that this contention of counsel may be best answered by the opinion of the Supreme Court of Wisconsin in State of Wisconsin *v.* Thompson, 154 Wis. 320. That case involved the question of whether certain transfers were made by the decedent, Joseph Dessert, in contemplation of death. The court of first instance held the transfers to have been made in contemplation of death, but this decision was reversed by the Circuit Court. The latter decision was affirmed by the Supreme Court. The earlier gift involved in that case was made four and one-half years prior to the death of the decedent, and the later gift, a few days less than three years before his death. All of the gifts were made to the daughter of the donor and her husband. Mr. Dessert was 86 years of age at the time he made the earlier of these gifts; but he was enjoying good health and his mental faculties were unimpaired. The contentions of the State in the cited case were these:

"(1) The gifts were substantially in accordance with the will of the deceased, made in 1891;

"(2) They included more than ⅔ of the large estate;

"(3) The deceased had reached an extreme old age;

"(4) He had surrendered the management of his property and his business."

After referring to the earlier case of State of Wisconsin v. Pabst, 139 Wis. 561, the Court said:

> "The definition of the words 'in contemplation of death' given in the *Pabst* case does not differ from that announced by the New York court in re *Baker's Estate*, 83 App. Div. 530, 82 N. Y. Supp. 390; affirmed 178 N. Y. 575, 70 N. E. 1094, where it is said 'this court has held that the words "in contemplation of death" do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril'. Neither does it differ from the interpretation put upon the words by the Illinois Court in *People v. Burkhalter*, 247 Ill. 600, 604, 93 N. E. 379, 139 Am. St. Rep. 351, where it held that contemplation of death must be the impelling motive for making a gift in order that it be subject to an inheritance tax."

Answering the contentions of the State, the Court said:

> "It is only gifts made in contemplation of death that are taxable. A parent has the right to give his property to any proper subject of his bounty, freed from any transfer tax, provided the contemplation of death is not the cause which impels the making of the donation.

"It is apparent therefore that it would be illogical to hold that proof that a person was aged when he made a gift conclusively establishes that it was made in contemplation of death. This could not be true if the donor might be actuated by any other motive. Common knowledge and experience teach us that aged people frequently give property to their children because of their desire to help them, and without any thought in reference to their own deaths. Mr. Carnegie is an old man in years. He has given away what would make several princely fortunes. It could not be fairly said that the feeling that he must soon die was the cause that actuated him to give. Instead, it was the pleasure of bestowing a part of his fortune where he conceived it would accomplish much for the uplift and betterment of mankind by furnishing useful and helpful reading matter free of charge.

"This brings us to the last question in the case, and that is whether the age of Mr. Dessert was so great when the gifts in question were made as to establish the fact that they were made in contemplation of death. If there is room for conflicting inferences, the decision of the circuit court must stand. The deceased was 86 years old when he made the first of the large gifts and a year and a half older when the second one was made. He died at the age of 92, being sound and active in mind and body until three months before his death. The evidence all tended to show that his physical and mental faculties remained unimpaired until his last illness, except that he was somewhat deaf.

"We do not think the court can fix any particular age limit, and say that after it is reached

a party can give his property away only in contemplation of death. In a sense, 'old age' is a relative term. Some men are old at 60, although they may have no organic disease. Others are vigorous in mind and body at 70, and still others long after they have passed their eightieth milestone. There are octogenarians among the members of the Dane county bar at the present time. One is as actively engaged in his professional work as he was 25 years ago. Another is creditably administering the affairs of an important office. The third is retired from active labor. Chief Justice Fuller performed his arduous labors until he reached the age of 77. Justice Harlan did likewise until he was 78. Justice Field until he was 83, and Chief Justice Taney until he was past 87. The venerable Ex-Chief Justice Lyon of this court recently died at the age of 91, retaining his bodily and mental vigor until a short time before his death. Ex-Speaker Cannon, now past 77, is an antagonist who might well command both fear and respect in any forensic encounter in which he might see fit to engage.

"Age in itself is not a very important factor in determining the capacity of persons to deal with their property or in ascertaining the motives which actuated them in disposing of it. The deceased in this case might have made the gifts which he did because he expected to die at any time. *But it was just as reasonable an inference for the trial court to draw that he made the gifts without any particular thought of death and because he wanted his daughter and her family to enjoy the benefits of a part of his accumulations and to see her and them use what*

> *was given while he was still alive so that he could observe the uses to which it was put.* It is an erroneous concept to conclude that aged persons dispose of their property because they think that death is staring them in the face. The hypochondriac or the pessimist might entertain such an idea, but such a one rarely attains old age. On the contrary, we think it is true that persons who have lived long and who are free from disease generally entertain the feeling that they have a few years longer to live, no matter how old they are, and that they do not regard death as imminent. We are not disposed to say in the instant case that the circuit court did not draw an entirely correct inference from the testimony, much less to say that its decision should be set aside."

2. It is stated as a proposition in the brief for petitioner (p. 17):

> "The presumption that a gift made within two years of death was made in contemplation of death can be overcome only by proof that the donor was actuated by a desire to achieve some purpose during his lifetime as distinguished from one related primarily to the devolution of his estate at death."

We understand that by this proposition counsel intend to emphasize the distinction between a "desire to achieve some purpose during his lifetime" and a desire relating "primarily to the devolution of his estate at death". In the course of the discussion of this proposition, the brief for petitioner asserts (p. 20):

"In those cases in which the transfers have been held not in contemplation of death there has always been proof that the donor wished to accomplish some purpose during his own lifetime and was induced by such a desire to make the gift. Thus transfers made for the purpose of relieving the donor of the cares of management or in order that his children may experience the responsibilities of business under his guidance and supervision have been held to be of that character. *Flannery v. Willcuts*, 25 F. (2d) 951 (C. C. A. 8th), *supra; Tips v. Bass*, 21 F. (2d) 460 (W. D. Tex.); *White v. Commissioner*, 15 B. T. A. 470; *Gimbel v. Commissioner*, 11 B. T. A. 214. Similarly, where the donor in order to reduce income taxes has transferred property to others, his purpose has been recognized as one pertaining to his lifetime and not in contemplation of death. *Vaughan v. Riordan*, 280 Fed. 742 (W. D. N. Y.), *supra.*"

In no case coming under our observation has it appeared that the donor stated more clearly than he did in the present case his purpose in making the gifts.

The purpose of any decedent in making a gift must be determined in the light of all facts and circumstances of the case. Material to this determination is the fixed policy and the philosophy of the decedent respecting gifts to those whom he regards as proper objects of his bounty. Naturally, we would scrutinize more carefully a gift of substantial size by a miserly father, one who had always given his children as little as possible, while we would regard as a matter of course a gift of the same size by a father who had

inaugurated twenty years before and had continued down through the years a policy of making liberal gifts to his children. The philosophy of the donor respecting the desirability of the continued ownership of property, *i. e.*, whether it is the *summum bonum* of life, may throw light on the purpose of the donor in any case. What in one case would give rise to speculation and doubt might readily be accepted as evidencing an unmistakable purpose in another.

Mr. Wells' policy and philosophy were all on the side of liberality and generosity to his children. His fixed policy was to make gifts to them during his lifetime. This purpose was conceived, not with the idea in mind *of death*, near or remote, but with the thought of accomplishing a definite purpose *in life*, viz, to assist his children in taking care of the property he gave to them. His avowed purpose was to give them the benefit of his larger business experience. We quote the 4th Finding of Fact (Rec. 15):

> "For a considerable period of time the decedent was engaged in the lumber business with the late Senator Isaac Stephenson, who died in or about the year 1918. It appears that Mr. Stephenson's policy in the matter of gifts or advancements to his children was not so liberal as that of the decedent. About the time of Mr. Stephenson's death this subject was discussed by the decedent with business associates.
>
> "The decedent expressed it as his opinion that the proper thing for a man of wealth to do was to give his children substantial sums of money during his lifetime while he could advise with them as to its proper use. He further ex-

pressed the opinion that some wealthy men who had recently died leaving estates had made a great mistake, and informed his friend Blom, 'I am making distribution from time to time of part of my property to see what my children will do during my lifetime, and I will then know when my time is up what I ought to do with the balance.'

"He frequently expressed his opinion that his friend, Senator Stephenson, had made a big mistake in not distributing his property to his children while he was alive to help them handle it properly and said 'that is not my policy'."

The inference of fact and the conclusion of the law of the Court below on this subject were (Rec. 36):

"The plaintiffs have not only overcome the presumption created by the statute that the transfers were made in contemplation of death but have definitely established the fact, that the immediate and moving cause of the transfers was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

"That this was the motive which actuated the decedent in making these transfers seems unquestioned. He repeatedly, in letters to his children and in statements to business associates at about the time the transfers were made, gave this as his reason for such transfers."

Our conclusion, therefore, is that the case for the executors of Mr. Wells' estate fully meets the test laid down in the brief for petitioner.

It was here shown that the donor was actuated by a desire to achieve a definite purpose during his lifetime rather than by any thought regarding the devolution of his estate at death.

3. Reference is made in the brief for petitioner to the following provision of Regulations 37 of the Bureau of Internal Revenue (Brief for petitioner, p. 24):

> "The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability; but it is a circumstance to be considered in determining whether the transfer was made in contemplation of death."

While such was the provision of the regulations in force at the time of the decedent's death, it has since been modified under statutes containing substantially the same provisions as to gifts in contemplation of death as Section 402 of the Revenue Act of 1918. Not infrequently gifts to children are advancements and, evidently recognizing that the latter part of the above quotation was of doubtful correctness, the Bureau of Internal Revenue eliminated the clause "but it is a circumstance * * *" from the present regulations relating to gifts alleged to have been made in contemplation of death. The provision as it now appears in Article 16 of Regulations 70 contains merely this:

> "The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not, in and of itself, determinative of its taxability."

4. We notice the following contentions of counsel respecting the facts of this case:

(*a*) Emphasis is laid by counsel upon the fact or supposed fact that the decedent believed his father died of chronic dysentery during the Civil War. The facts pertaining to this matter are to be taken from the 6th Finding of Fact (Rec. 16), which reads as follows:

> "Mrs. Florence W. Law, one of decedent's daughters, testified that decedent's father died in the Civil War; that he was injured in the Civil War. The records of the Presbyterian Hospital, however, show that decedent, himself, in giving his family history on May 28, 1919, told the hospital authorities that his father had 'died of chronic dysentery'. With the exception of his father the decedent's family appears to be a long-lived one."

Upon this point counsel say (Brief for petitioner, p. 26):

> "The decedent had recently passed through a serious and painful illness and, although he had been pronounced cured, there must have been in his mind the thought that a man of his age, having once been afflicted with an ailment of that nature, must face the possibility that death was reasonably near at hand. The physical circumstances alone would justify this supposition, but we have the additional fact that

the decedent believed his father's death to have been caused by the same disease from which he himself had suffered."

From the Findings of Fact, it is not certain just what caused the death of decedent's father; and it is certainly a far cry from the above finding to the assumption that the decedent was influenced to make the transfers by the death of his father, which occurred almost sixty years before the events involved in the present case. There is, of course, no evidence that the "chronic dysentery" of the father, if indeed he had any such trouble, was the disease of colitis or any trouble similar to that from which the decedent suffered. It is a matter of common knowledge that disease-producing conditions during war times are so materially different from the corresponding conditions of peace times that it is difficult to draw any analogy between the two periods.

As shown by the Findings of Fact, at the time the last gifts were made by the decedent in the present case, he had completely recovered from the attack of colitis from which he had suffered during the preceding summer. At that time he had recovered his normal good health and was then engaged in his usual business activities. He was then planning his customary winter visit to Southern California. He had been told by his physician that he had recovered from the colitis attack of the preceding summer.

Will it be said that in December, 1920-January, 1921, he could foresee that he would suffer from an entirely new attack of the colitis trouble four months later, an

attack that was not foreseen or anticipated by his attending physician? Will it be said, further, that he foresaw not only that the attack would come again, but also that it would be fatal—this in the light of his recovery from a former attack? Is it given to man thus to foresee the future?

The following testimony relating to decedent's condition immediately after the last transfers were made, was embodied in the 25th Finding of Fact (Rec. 25):

> "He was vigorous and had an excellent color. He was having, and had had for months then, a normal bowel functioning. He was eating everything and, with the exception of the fact that his asthma had at that time not entirely cleared up, he considered himself well, and I told him that he need have no anxiety whatever about his state of health; that I considered him in excellent condition; that he need have no fears of any recurrence of the ulcerated colitis. As a matter of fact, my statement to him was justified by the fact that since he had left the hospital the preceding September, a matter of practically four months, he had enjoyed as normal a bowel function, I suppose, as the average man."

From this and other findings, the Court below made the following inferences of fact (Rec. 36):

> "After the final transfer in which the advancements and gifts to the children were evened up in January, 1921, the decedent still possessed property of the value of nearly $900,000, from which he drew an annual income of approximately $50,000. At the time the transfers were made, decedent had no reason to

believe otherwise than, aside from his asthma, he was, for a man of his age, in ordinary health. While he had gone through a most serious and painful illness, he had, as he believed made an almost complete recovery. He was assured of this fact by his physician, an eminent specialist, in whom he had great confidence. The repeated statements made by him to close friends and associates, his daily activities in matters connected with his business affairs, his letters to his children assuring them of his renewed health, show that he fully believed the assurances given him by his physician that he was cured and had nothing to fear on account of his former illness."

(*b*) We take the following from the brief for petitioner (pp. 26-27):

> "The optimistic statements which the decedent made to his family and friends are not necessarily indicative of his true state of mind. He had been an active man, living a busy life, and such men are not usually prone to admit to others—least of all to their immediate families—that they are no longer as vigorous as they used to be. Moreover, the decedent was much concerned with putting his affairs in order in anticipation of death."

The last statement is a conclusion which, we submit, is not supported by this record. As to the decedent's statement regarding the state of his health, we quote the following from the decision of the Court below (Rec. 36-37):

> "The presumption created by the statute that the transfers in question were made in contem-

plation of death cannot stand against ascertained and proven facts showing the contrary to be true. The best evidence of the state of the decedent's health at the time the transfers were made is the statement of his doctor. The best evidence of the decedent's state of mind at that time and the reasons actuating him in making the transfers are the statements and expressions of the decedent himself supported as such statements are by all the circumstances concerning the transfers. Decedent's physician says that at the time the transfers were made he was in normal health for a man of his age. *The decedent in letters to his children and in statements to his friends repeatedly assured them he had recovered from his former illness and was again enjoying reasonable health.* He also gave satisfactory reasons for making the transfers in question, which reasons are entirely consistent with all the other facts and circumstances surrounding the transactions and with the policy followed by him for many years in dealing with his children."

In effect, this Court is asked to find that the decedent did not believe what he told his close friends and what he wrote in his letters to his children concerning his own health. That is a finding that the Court below, a fact-finding tribunal, with all the evidence and the report of its own Commissioner before it, refused to make.

The interpretation of the term "contemplation of death" has been before many of the State courts. In

an appendix to this brief we include several of the decisions of State courts of last resort interpreting that term.

For these reasons, we respectfully ask for an affirmance of the decision of the lower Court.

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APPENDIX.

Decisions of State Courts in Contemplation-of-death Cases.

Matter of Baker, 83 App. Div. 530 (1903), aff'd 178 N. Y. 575 (1904) on opinion below:

Tax claimed under Laws of 1896, chap. 908, as amended by Laws of 1897, chap. 284—Subdivision 3 of sec. 220 of the General Tax Law:

> "This court has held that the words 'in contemplation of the death' do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril (Matter of Spaulding, supra; aff'd 163 N. Y. 607); and this we believe is now the generally accepted definition of the phrase."

State v. Pabst, 139 Wis. 561 (1909):

Tax claimed under chap. 44, Laws of 1903, as amended by chap. 249, Laws of 1903.

> "The meaning of the words 'in contemplation of death' as used in the statute, must be inferred and ascertained from the context of the act and the object sought to be accomplished by the law. It is manifest that they were intended to cover transfers of parties who were prompted to make them by reason of the expectation of death and which, in view of that event, accomplish transfers of the property of decedents in the nature of a testamentary disposition. It is therefore obvious that they are not used as referring to that expectation of

death generally entertained by every person. The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty. This accords with the general objects and purposes of the law, namely, the imposition of a tax on the devolution of property involved in the demise of the owner. * * *

"The claim that the words can include only gifts *causa mortis* attributes to them too restricted a meaning. A transfer valid as a gift *inter vivos*, if made under circumstances which impress it with the distinguishing characteristics of being prompted by an apprehension of impending death, occasioned by a bodily or mental state which has a basis for the apprehension that death is imminent, would be a transfer made in contemplation of death within the meaning of the law."

Spreckels v. State, 30 Cal. App. 363 (May 2, 1916):

The tax was claimed under Section 1 of the Acts of 1905, page 341, commonly known and referred to as the Inheritance Tax Law. The pertinent part of that statute reads as follows:

"All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation

> of the death of the grantor, vendor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, * * * shall be and is subject to a tax * * *."

Mrs. Spreckels, who made the gifts in question, died February 15, 1910, prior to the enactment of the Amendment of 1911, referred to in the following quotation. The Court, in its opinion, pages 369-371, has the following to say relative to the meaning of the phrase "in contemplation of death":

> "First, it will be well to inquire into the legislative meaning and scope of the language, 'in contemplation of death', as that phrase is used in the statute. It certainly cannot justly be held that the purpose or the intention of the legislature was, by the law in question, to subject every transfer of property by gift to the burden of the inheritance tax. Obviously (in other words), the language referred to was not intended to include that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life, and which is in the young and the physically robust as well as in the aged and the infirm. No similar statute has been so construed. A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden. Or, as counsel for the respondents with singular aptness states the proposition: 'It is only when contemplation of death is the motive without which the conveyance would not be

made, that a transfer may be subjected to the tax.' That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer. Or, as the proposition is perhaps the more lucidly explained as follows in Ross on Inheritance Taxation, section 117, referring to the words, 'in contemplation of death', as they are used in statutes authorizing the subjection of property transferred by gift to the burdens of an inheritance tax. 'They are intended to cover transfers of persons who are prompted to act by reason of the expectation of death and who thereby accomplish transmissions of property in the nature of testamentary dispositions. The words do not refer to that general expectation commonly entertained by all persons, but rather to that apprehension which arises from some existing condition of body or some impending peril.'

"Again, in Andrews on the Transfer Tax Law of New York, page 172, it is said: 'The statute was evidently intended to reach absolute transfers of property when made under certain conditions, viz., when the transferror was contemplating death. That is, the thought of death has taken so firm a hold on his mind as to control and dictate his actions regarding his property and the business is transacted while contemplating death and considering what conditions would arise or exist in the event of death without making the transfer, or, to be more specific, the contemplation of death is the sole motive and cause of the transfer; * * * but if made with other motives and for other causes it is not taxable no matter when made, as it cannot be presumed that the legislature intended to place any limitation upon the inherent right of

a person to give away his property whenever, and to whomsoever, he desires.'

"The views thus expressed upon the meaning of the words referred to are in harmony with those to be found in all the cases. (See *State v. Pabst*, 139 Wis. 561, (121 N. W. 351); *Rosenthal v. People*, 211 Ill. 309 (71 N. E. 1122); *People v. Burkhalter*, 247 Ill. 600 (139 Am. St. Rep. 351, 93 N. E. 379); *In re Dessert's Estate*, 154 Wis. 320 (Ann. Cas. 1915B, 1084, 46 L. R. A. (N. S.) 790, 142 N. W. 647).) And, as we understand the case of *Estate of Reynolds*, 169 Cal. 600, 603 (147 Pac. 268, 270), there is no expression therein with which the views above expressed conflict. In that case, Mr. Justice Henshaw criticises the construction put upon a similar statute of the State of New York by the courts of that state, it having at first been held by those courts that a transfer of property 'in contemplation of death' within the meaning of the Inheritance Tax Law of said state meant a gift *causa mortis*, and that the law was 'applicable to no other kinds or characters of transfers.' Judge Henshaw, referring to the New York decisions, said in the Reynolds case: 'Nothing in our law compels us to adopt the restricted construction put by the courts of New York upon their own statute and everything in our law directs that a liberal construction should be placed upon it to the end that its provisions may not be evaded.' The Reynolds case was decided in the year 1912 after the legislature of 1911 had, among other changes, added the following provision to our Inheritance Tax Law: 'The words "contemplation of death," as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of a

will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis;* and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws.' This amendment, as was said of it in the Reynolds case, in no manner changed the law as it stood prior thereto, but its purpose and effect were merely to give a clearer expression to the legislative intent and meaning of the law, or to make certain that which might otherwise have been regarded as doubtful, viz., that the intent of the legislature was to subject to the tax all property transferred as a testamentary disposal thereof, whether such transfer was by gift *inter vivos* or by will and testament."

Commonwealth v. Fenley, 189 Ky. 480 (1920):

Court held that certain transfers were not taxable as having been made in contemplation of death. At pages 482-483 the court said:

"The anticipation or apprehension of death in the ordinary and natural course of events is not such contemplation of death as the statute has in view. The contemplation of death the statute speaks of is a present apprehension of death arising from some existing condition or impending peril that would reasonably create a fear that death was near at hand, as, for example, when the grantor is in bad health and the compelling thought of death is prominent in his mind, or when he is in the presence of or

there is fear or apprehension of some danger or peril that might reasonably and naturally produce an expectation of death.

"Of course, every person knows that at some time he will certainly die, and if this ever existing knowledge of death at some time in the future was the contemplation of death within the meaning of the statute then no person at any time during life could make a transfer of property by deed, grant, sale or gift that would not be subject to an inheritance tax, although the person making the deed, grant, sale or gift might be in perfect health at the time the transaction took place and live for twenty or thirty or fifty years thereafter. Certainly the statute does not intend and ought not be so construed as to subject to an inheritance tax gifts or transfers of property made under circumstances such as we have supposed, and it is a matter of common knowledge that many gifts and transfers of property are made when circumstances such as these exist.

"The statute was enacted primarily for the purpose of levying a tax on property passing by will or the intestate laws of the state from any person who might die seized or possessed of the same while a resident of the state, or, if not a resident of the state, whose property so passing was within the state. It was not intended to put a tax upon all transfers or gifts of property.

"The imposition of the tax upon transfers and gifts during the life of the grantor was only designed to prevent the primary purpose of the statute from being defeated or evaded by gifts or transfers that might be made when

death was reasonably believed to be impending, and therefore we think that when the Commonwealth seeks to tax under this statute property transferred by deed, grant, sale or gift it is incumbent upon it to show that the person making the deed, transfer, grant, or gift was by reason of the condition of his health or the presence of some threatening danger or peril seeking to dispose of his estate before death came, and so whether the estate is or not taxable is a question to be determined by the facts and circumstances of the particular case."

At page 484, the court further said:

"In 26 R. C. L., p. 225, the prevailing rule in the construction of statutes reading like ours is thus stated: 'It has sometimes been held that such statutes apply only to gifts *causa mortis*, and to gifts made for the purpose of evading the inheritance tax. But the sounder view is that the statutes apply to gifts *inter vivos* as well as *causa mortis*, provided they are made "in contemplation of death," that is, an apprehension of death arising from some existing bodily condition or impending peril and not the general expectation of eventual decease commonly entertained by all persons. The contemplation of death must be the impelling motive without which the conveyance would not be made in order to subject the transfer of property to the inheritance tax. Whether a gift is made in contemplation of death so as to be subject to the inheritance tax is a question of fact.' Cases illustrating and supporting this rule are: *Spreckels v. State*, 30 Cal. App. 363; *People v. Burkhalter*, 247 Ill. 600; *State v. Pabst*, 139 Wis. 561;

Conway v. State, 120 N. E. 717,—Ind. Appellate."

To the foregoing we subjoin the following definition taken from *George A. Wheelock's Estate v. Commissioner of Internal Revenue*, 13 B. T. A., at p. 831:

> "The phrase 'in contemplation of death,' has been held to mean not that general contemplation of death which is present with all persons, knowing as they do that at some time they must die, but that state of mind or present apprehension resulting from some existing bodily or mental condition or other producing cause which leads to the conviction that death is to be anticipated within a reasonable time in the near future. *Meyer v. United States*, 60 Ct. Cls., 474; *Rea v. Heiner*, 6 Fed. (2nd) 389; *Philip T. Starck, Executor*, 3 B. T. A. 514; *Joseph Edward Phillips*, 7 B. T. A. 1054."